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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October term, 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
Appellant,

vs.

THE GILA WATER COMPANY.

BRIEF FOR APPELLANT.

Statement of the Case.

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Statement of the Case.

This was a suit filed by the appellant in the District Court of Maricopa County, Arizona, on June 25, 1902, to quiet its title to certain lands, dams, canals, water rights, rights of way, easements, and appurtenances, comprising an irrigation system situate in said county (R., 1-4).

All of the defendants except the appellee, the Gila Water Company, filed disclaimers (R., 5-6), thus reducing the controversy to one between the appellant and the appellee.

The appellee answered, denying the title of the complainant and setting up title in itself to the property in question, and averring that it and its grantors had been in peaceable and adverse possession of all the said property under title and color of title for more than three years preceding the commencement of the suit, and further that it and its grantors had been in peaceable and adverse possession of all the said property for more than five years prior to the commencement of the suit, using and enjoying the same and paying taxes thereon, claiming under deeds duly recorded, and by way of cross-complaint sought to have its own alleged title quieted as against the claim of the complainant (R., 6-7).

The appellant answered the cross-complaint, denying the appellee's alleged title and averring that the appellee pretended to claim title under an alleged decree of the said District Court of date November 20, 1894, and a certain pretended receiver's deed pursuant thereto, and through certain deeds of persons claiming to deraign title through said receiver's deed, but that the said decree and all proceedings thereunder were void because the court was without jurisdiction.

In response to the allegations of the cross-complaint of adverse possession in the appellee the appellant alleged that during all the time that the appellee claimed to have obtained title to the property the same was in the custody of the said District Court through its receiver in a certain other action pending therein, and that any and all muniments of title which the appellee may have received by tax deeds or otherwise were void (R., 8-9).

Upon these issues the case went to trial before the court without a jury, and a decree was entered dismissing the appellant's complaint and declaring the appellee to be the owner in fee of the property in question and quieting its

title (R., 13). Formal findings of fact and conclusions of law were filed and appear at pp. 35-37 of the record. The findings of fact need not be noticed for, though in form findings of fact, they are in reality merely conclusions of law that the appellee is the owner in fee of the property and that the appellant had shown no title at the time of the commencement of the suit.

At the trial the appellant reserved exceptions to the rulings of the court in admitting and excluding evidence, and also to the action of the court in dismissing the complaint and giving judgment for the appellee, and these exceptions and so much of the evidence as was deemed by the trial court sufficient for the purpose of such exceptions, appear in a bill of exception (R., 15-30).

Under the heading, Part II, Circumstances and Evidence (R., 18-30), the bill of exceptions presents an abstract of the evidence admitted or offered at the trial, from which it appears that the appellee deraigns its alleged title from the appellant through the proceedings in the suit mentioned in the appellant's answer to the cross-complaint (which will hereinafter be designated as Suit 1996) so that the controlling question in the case is the validity of the title so acquired.

The appellant, at the trial, introduced:

1st. The records of its title (R., 18).

2d. A tripartite agreement of June 16, 1893, between the appellant, the Arizona Construction Company, and the Peoria Canal Company (R., 19), from which it appears that the Arizona Construction Company, under contracts with the appellant, had constructed certain works and, differences and controversies having arisen and sales under certain deeds of trust given to secure the Arizona Construction Company having been enjoined at the suit of the appellant, it was agreed by way of settlement and adjustment that the injunction should

be dissolved, the sales proceed, and the title of the appellant's property be vested in the Peoria Canal Company by said company becoming the purchaser, that all of the stock of the Peoria Canal Company should be placed in escrow and become the property of the appellant upon full payment of notes of the Peoria Company, payable on or before two years, to be given the Arizona Company for the total amount of money invested by or owed by it, and that the Peoria Company should issue $750,000 first mortgage and $350,000 second mortgage bonds, the proceeds of which should be applied to the liquidation of the said notes. It was further provided that the cost of maintenance and repairs should be paid from the proceeds of the bonds or of sales of water rights (R., 19).

3d. A *lis pendens,* filed September 23, 1893, giving notice of a suit (which will hereinafter be referred to as No. 1728) filed in said District Court by the appellant against the Peoria Canal Company and the Arizona Construction Company seeking a decree declaring the appellant to be the equitable owner of the property in question, and specific performance of the tripartite agreement of June 16, 1893, and for general relief (R., 19-20).

4th. The application of the Peoria Canal Company, filed in said Suit No. 1728 on December 4, 1893, for the appointment of a receiver, setting forth that the said company was in possession of the property by virtue of the said tripartite agreement, and that by reason of damage by a flood and other circumstances a receiver was necessary to repair, operate and control the property. And an order in said cause appointing James McMillan receiver, with power *"to bring and defend suits,* to receive and collect rents, and especially to repair, rebuild, *and to save the property from all loss by reason of liens and judgments"* (R., 20).

At this point the appellant rested, upon the theory that its title was established, inasmuch as the Arizona Construc-

tion Company, the Peoria Canal Company, and McMillan, the receiver in Suit No. 1728, had disclaimed any interest in the property.

The appellee offered all of the evidence offered by the plaintiff, and, in addition, the complaint in Suit No. 1728, the answer therein of the Arizona Construction Company and the Peoria Canal Company, setting up *inter alia* that the amount payable to the Arizona Construction Company and to be represented by notes of the Peoria Canal Company under the tripartite agreement was $721,679.02 (R., 20-21), and the application for, and order appointing, the receiver *supra* (R., 21).

The defendant next introduced the complaint and exhibits, summons and answers in Suit No. 1996, W. H. Linn *et al vs.* the appellant and the Arizona Construction Company, the Peoria Canal Company and six individuals whose alleged interest does not appear in this record.

> It appears by the complaint in that suit, filed May 23, 1894, that the complainants therein were simple contract creditors of the Arizona Construction Company claiming to have advanced money to that company which was used in and about the construction of a certain dam and canal for the appellant, and that they charged that the tripartite agreement of June 16, 1893, was made without their consent and was in fraud of their rights, and that all of the parties to that agreement were insolvent. *The complaint further averred the appointment of the receiver in Suit No. 1728 and that such receiver had on or about December 7, 1893, taken possession of the property and was still in possession thereof,* and prayed that the court appoint a receiver or enlarge the powers of the "present receiver" and take possession of the property and sell it to pay the debts (R., 21).
>
> Summons thereon was returned May 25, 1894, served as to the appellant and *non est* as to the remaining defendants (R., 21).

The Arizona Construction Company and the Peoria Canal Company answered May 24 and 26, 1893, alleging that the tripartite agreement had been made in fraud of the rights of complainants and was impracticable and had not been carried out, and joining in the prayers of the complaint (R., 21-22).

The appellant and the defendant Burnett filed demurrers and general denials (R., 22). The defendant Wynd answered alleging that he was a stranger to the suit and setting up title under a sheriff's deed. The remaining defendants joined in the prayers of the complaint (R., 22).

The appellee next introduced the decree of *July* 21, 1894, in Suit No. 1996, which declared that *the Peoria Canal Company took the property as trustee under the tripartite agreement of June* 16, 1893, that said agreement had failed and was incapable of execution, that the complainants were creditors of the Arizona Construction Company prior to the execution of said agreement and had never assented thereto and that their claims were due and unpaid, and ordered that McMillan "the receiver heretofore appointed by this Court and now in possession of said premises under the orders of this Court" (in Suit No. 1728) proceed to advertise and sell said property, and distribute the proceeds as directed (R., 22). And the decree of *November* 20, 1894, in said Suit No. 1996, "which states that it is to be read and be *in lieu* of the decree of July 21, 1894," and followed the form thereof, with the addition of the defendants Crowley, Toohey, and Wynd [Wynd having no claim of title] to the class of creditors of the Arizona Construction Co. who had not assented to the tripartite agreement, and the addition of allowances to claimants who had filed claims subsequent to the former decree (R., 22-23).

The appellee then introduced the assignments of error in Suit No. 1996 from I to LXV, of which I, II and III al-

leged error in denying appellant's petition for change of venue and retaining jurisdiction after the filing of said petition and affidavits in support thereof, and LIII, error in admitting a certain sheriff's deed to the defendant Wynd over the objection that no title was claimed thereunder (R., 23-24); also motion for new trial made November 20, 1894, order denying the same, notice of appeal, and the further assignments of error LXVI to LXX, of which LXVII "alleges error in that no receiver had been appointed in said Suit No. 1996, nor had the powers of the receiver of Suit No. 1728 ever been enlarged to give the Court jurisdiction to so order the receiver of said Suit No. 1728 (R., 23-24). [By reference to the transcript of record in this Court in No. 199 October term, 1897, the full text of this assignment will be found and it will appear that the exception was directed to the portion of the decree ordering the appellant to make a certain payment as a condition of avoiding sale by the receiver.]

The appellee also introduced evidence that the May term 1894 of said District Court adjourned *sine die* December 5, 1894 (R., 23-24); a report dated January 3, 1895, bearing a double heading, viz: titles and numbers of suits 1728 and 1996, purporting to be of a sale of the property by McMillan, receiver, under orders and decree in Suit No. 1996, as amended November 20, 1894, to Crowley, one of the disclaiming defendants, and stating that over $100,000 of receiver's certificates were still outstanding; and an order of the said Court, (January 10, 1895) bearing a similar heading, confirming said sale upon condition that possession be not given until all the outstanding receiver's certificates should be paid off; and a deed of said property to Crowley purporting to be from McMillan, as receiver in said Suits Nos. 1728 and 1996, pursuant to orders and decrees in No. 1996, and deeds from Crowley to the

Valley Canal and Land Company and from said Company to the appellee (R., 24).

Also decree of February 18, 1899, in Suit No. 1728, *that the defendants go without day,* from which the appellant perfected an appeal to the Supreme Court of the Territory on April 16, 1899, which Court affirmed the decree below and handed down findings of fact in the nature of a special verdict, set out substantially in full in the record at pages 24-27, from which it appears that the Court in that case found *inter alia*:

> That the case (No. 1728) was tried and on January 5, 1894, submitted and taken under advisement; that the decree of November 20, 1894, in Suit No. 1996 was affirmed by the Territorial and United States Supreme Courts, whereupon McMillan, the receiver, proceeded to readvertise and sell the property; that on October 13, 1898, the appellant without leave of Court deposited in the clerk's office of the said District Court a Supplemental Complaint and, upon motion based thereon and without service on the receiver or defendants in said Cause No. 1728, the Court made an order directing the receiver to show cause why he should not be restrained from selling said property; that the receiver appeared and showed the decree in No. 1996 and, no evidence being offered, the motion to restrain was denied, and on November 23, 1898, the receiver sold the property to J. B. Greenhut (one of the disclaiming defendants herein); that the appellant moved the Court to restrain the receiver from conveying the property and, the motion not being based on any papers, affidavits, or other documents or facts, the receiver justified under the decree in 1996, as before, and the Court denied the motion, no evidence being offered except the records in the two Suits Nos. 1728 and 1996; that on February 4, 1899, the cause was set for final hearing, and on February 18, 1899, was heard and tried, no testimony

being offered or taken other than that taken and filed in November, 1893 (R., 25-26)."

As affecting the relief sought in that Suit (No. 1728), the Supreme Court of the Territory found that the appellant had not been injured nor damaged by any acts of the receiver or defendants therein and that all acts and doings of the receiver had been under orders and judgments of the District Court appointing him such receiver, that he was in possession and control of the property when ordered by the Court in Suit No. 1996 to sell the same, that the parties to Suit No. 1728 were parties to Suit No. 1996, in which all the rights of the appellant were at issue and as fully determined as they could have been in No. 1728, and that the appellant's Supplemental Complaint was not filed by leave of Court nor served on either of the defendants in No. 1728 (R., 27).

The appellee also introduced the report made in Suit No. 1996 by McMillan, as receiver, of sale of the property to Greenhut November 23, 1898, for $18,800, stating that Crowley, the former purchaser had failed to pay off the receiver's certificates and that the receiver had never given him possession, and reciting that the sale to Greenhut was made under the amended decree of November 20, 1894, and the order of January 10, 1895 (confirming the sale to Crowley); also the order in Suit No. 1996 confirming the sale to Greenhut, also deed from the receiver to Greenhut purporting to be by a receiver duly appointed in Suits Nos. 1728 and 1996, and reciting that the sale was made under orders and decrees in No. 1996; also deed from Greenhut to the appellee (R., 27).

The appellant duly excepted to the admission of the various proceedings in Suit No. 1996, and all of the deeds under which the appellee deraigned title, upon the grounds (Nos. 2, and 4, R., 15-16):

1st. That the complaint therein showed that it asked seizure of property in the hands of a receiver in a prior suit (No. 1728) who was not made a party thereto.

2d. The complaint, summons and answers tended to show collusion between the complainant and the defendants other than the appellant.

3d. That the decrees attempted to order the sale of property in the hands of the receiver in Suit No. 1728 who had not been made party to No. 1996, and that the two suits had never been consolidated.

4th. That the complaint prayed for sale of the property and not for judgment *in personam* against the appellant or any of the defendants.

5th. That the said decrees were for sale of the property and judgment *in personam* was not given against the appellant or any of the defendants.

W. C. Foster testified for the appellee that Greenhut had taken possession of the property upon receiving the receiver's deed and had placed a keeper in charge, and that the appellee took possession upon receiving the deed from Greenhut and was in possession when this suit was commenced (R., 27).

The appellee here rested and the appellant introduced the order of May 29, 1984, in Suit No. 1996, which purported to invest McMillan as receiver in No. 1728 with full possession and such title as to assure the purchasers of water rights a complete and perfect title to the same (R., 27).

Also appellant's motion for a new trial in Suit No. 1996 after the decree of July 21, 1894, and the order therein denying the same, and noting the appellant's appeal in open court (R., 28).

The following offers of further evidence were made by the appellant and, upon objection, rejected by the court (R., 28-29) and exception reserved (Nos. 5 to 17 R., 16-18):

The remainder of the record of Suit No. 1996 in the District and Territorial Supreme Courts which shows:

> The filing of an affidavit of bias and prejudice (Par. 14, R., 28).
>
> That the plaintiffs in No. 1996 were all stockholders and officers of the Arizona Construction Company, and that the stockholders of the Peoria Canal Company were the stockholders of the Arizona Construction Company.
>
> That the questions of jurisdiction over the *res*, loss of jurisdiction by reason of the perfecting of the appeal from the decree of July 21, 1894, and fraudulent collusion, were not presented in the briefs in the Territorial Supreme Court (Par. 16 R., 28).
>
> That no order was made by which the Court acquired control of the property and that no officer ever made any return showing that the property had been taken into the control or possession of the Court; that McMillan was never appointed receiver therein; and that the Court never acquired jurisdiction over the *res* (Par. 17, R., 28).
>
> That appellant perfected its appeal (Secs. 859-861, R. C. of Ariz. 1887) on November 12, 1894, by bond duly approved and filed (Par. 18, R., 28-29).

The records in Suits Nos. 1728 and 1996 in the Territorial Supreme Court showing that the order of January 10, 1895, in No. 1996, and the deeds from the alleged receiver to Crowley and Greenhut were not involved in those suits as appealed, and that said order has never been affirmed by any appellate court (Par. 20, R., 29).

And the record of Suit No. 1728 in the District and Territorial Supreme Courts showing, in further deraignment of its title:

> That the appellant filed a supplemental complaint therein, after first serving a copy thereof on the attorneys of record of the defendants, as evidenced by

indorsements thereon and thereby attempted to maintain its title and claim to the property (Par. 2, R., 29), and to have the receiver restrained from selling the same without authority in said suit (Par. 22, R., 29), and on November 23, 1898, applied to have the receiver restrained from conveying or giving possession pursuant to the sale to Greenhut until so ordered in that suit (Par. 23, R., 29).

That the appellant moved for a rehearing by the Territorial Supreme Court and that the same was denied in April, 1902 (Par. 24, R., 29).

That McMillan as receiver therein was never ordered or authorized by any order therein to sell or otherwise dispose of the property (Par. 25 [24] R., 29).

The District Court having entered its decree, dismissing the appellants complaint and quieting the title of the appellee under its cross-complaint, the appellant perfected its appeal to the Territorial Supreme Court.

Through inadvertance of the clerk, the transcript of record on appeal to this Court omitted the date of filing of the affidavit in lieu of bond on appeal to the Territorial Supreme Court. To supply this omission we have filed with the clerk a certificate of the clerk of the Court below supplying this omission and print the same herein, as follows:

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No 3966.

In the District Court, Third Judicial District, Territory of Arizona, County of Maricopa.

GILA BEND RESERVOIR AND IRRI. CO., *Plaintiff*,

vs.

PEORIA CANAL COMPANY, *et al.*, *Defendants.*

Affidavit in lieu of bonds to pay costs of Appeal or give Security therefor. Section 1507 R. S. of A. 1901.

Filed February 27, 1903,
ELIAS F. DUNLEVY, *Clerk.*
By J. E. STURGES, *Deputy.*

SUPREME COURT, TERRITORY OF ARIZONA } *ss.*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify to the foregoing to be a full, true and correct copy of the endorsement on the Affidavit in lieu of Cost Bond on Appeal in case of Gila Bend Reservoir and Irrigation Company *vs.* Peoria Canal Company, *et al.*

In witness whereof, I have hereunto set my hand and affixed my seal of said Court this 29th day of August, A. D. 1905, at Phoenix, Arizona.

[SEAL.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.
By ANGIE B. PARKER, *Deputy.*

The assignment of errors on appeal to the Territorial Supreme Court (R., 31-33) are substantially reiterations of the exceptions reserved at the trial (R., 15-18).

The Territorial Supreme Court affirmed the decree of the District Court (Opinion R., 37-40) and filed a statement of facts in the nature of a special verdict (R., 45) adopting the bill of exceptions, including the statement of circumstances and evidence, and further finding as facts (R., 45):

"That no order was made in the District Court consolidating Suits Nos. 1728 and 1996."

"That the receiver appointed in No. 1728 made the sale and executed the deed under which the appellee claims title."

"That no order was in terms made extending the receivership in No. 1728 to No. 1996, the latter case being the one in which the receiver made said sale and by the judgment therein assumed to convey the title to said property."

"That the only orders made in No. 1996 relating to said receivership are those dated May 29, 1894, July 21, 1894, November 20, 1894, and January 10, 1895, referred to in the bill of exceptions."

The Territorial Supreme Court in its opinion, however, drew conclusions not warranted by the facts so found by it or the facts set forth in the bill of exceptions adopted by it.

In the opinion it is said (R., 39):

"In passing upon this objection the trial court pointed out that all the parties in Cause No. 1728 were parties in Cause No. 1996, that, when the latter suit was brought, the property was in the hands of the Court, through its receiver, and that after the bringing of Cause No. 1996 the record disclosed that the Court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in Cause No. 1728, as though it had been placed in his possession as a receiver appointed in Cause No. 1996, and, further, that orders were made by the Court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms made extending the receivership to the second suit No. 1996, the receivership was in fact extended to the second suit, and that the Court, by its action ratified the acts of the receiver in the second suit, and thereby, in effect, extended his power and authority as such receiver to said second suit."

That the Court and all parties in Suit No. 1996 treated the property in the possession of the receiver as though it had been placed in his possession as a receiver appointed in No. 1996 is an assumption not warranted by the record, as shown by assignment LXVII, R., 24; and the only order entitled in both suits jointly was that of January 10, 1895 (confirming conditionally the sale to Crowley) entered after the appeal of the appellant in No. 1996 had been perfected (Par. 18 and 19, R., 28-29).

It is also stated in the opinion that the appellant applied for the appointment of a receiver in Suit No. 1728 which is also a manifest error, as the record shows that the receiver was appointed upon application of the Peoria Canal Company.

The Territorial Supreme Court held that the view taken by the trial court *supra*, was amply justified by an inspection of the record in Suits Nos. 1728 and 1996; that the failure of the trial court in No. 1996 to enter a formal order extending the receivership from No. 1728 to No. 1996 was a mere irregularity of practice which should have been taken advantage of during the pendency of the action; that it was within the power of the trial court to extend the receivership in No. 1728 to No. 1996; that, the trial court having jurisdiction of the property and the parties, the appellant had the right to object to the extension of the receivership so as to cover both cases without a formal order entered in that behalf; that the appellant could likewise have moved to set aside the judgment for that or any other irregularity, and if it did not take such action it must be held to have waived the error, and, if it took such action, the ruling of the court thereon, having been reviewed by the Territorial and United States Supreme Courts, can not now be reviewed; and that the judgment in No. 1996 was conclusive, and not subject to collateral attack by the appellant (Opinion, R., 39-40).

The appellant moved for a rehearing, pointing out the erroneous assumptions referred to and the errors of the Court in its conclusions of law (R., 40-42) and, the same being denied, prosecuted this appeal.

SPECIFICATIONS OF ERROR.

The errors of the Supreme Court of the Territory of Arizona, asserted by the appellant and intended to be urged are as follows:

1. The said Supreme Court erred in affirming the judgment of the District Court of the Third Judicial District of the Territory of Arizona, entered in this cause November 15, 1902, for that said District Court dismissed appellants complaint after appellant had proved an equitable interest in and to the property described in the complaint herein, and after all of the defendants had answered and disclaimed all right, title or interest in or to said property, except the Gila Water Company, and appellant had answered the cross-complaint of the Gila Water Company, and had set up the fact that the judgment under which said Gila Water Company would claim title, was and is absolutely void.

2. The said Supreme Court erred in refusing to sustain the exceptions taken by appellant to the errors of the said District Court in accepting and rejecting evidence as duly assigned to said Supreme Court for the reason that said exceptions were sanctioned by the law and the facts found in this case.

3. That said Supreme Court erred in affirming the judgment of the said District Court, for that the appellee claims title under a judgment rendered in Suit No. 1996, in said District Court. And said Suit No. 1996 was an action *in rem* against the property described, therein and the judg-

ment was for the sale of said property, and no judgment *in personam* was asked or given against the defendants or any of them, and that the Court in said Suit No. 1996 had never acquired or taken jurisdiction of the property therein asked to be sold, and therefore the judgment and all orders and decrees in said Suit No. 1996 were and are absolutely void.

4. That said Supreme Court erred in affirming the judgment of the said District Court, for that the appellee claims title under a judgment in Suit No. 1996, in said District Court and said judgment is void, in that there was collusion between the plaintiffs and defendants therein, in that plaintiffs were all stockholders in the Construction and Canal Companies; that the stockholders of said corporation were one and the same in each.

That all the other defendants were, by the title of the action, equally plaintiffs—that all answered without summons, and asked the same relief as plaintiffs, except Wynd and Burnett and they too were creditors of said Construction and Canal Corporations.

5. That said Supreme Court erred in affirming the judgment of the Court below in favor of appellee, for the reason that appellee asserts title to the property in dispute herein under the sale of the property made under the judgment in case No. 1996. Whereas the judgment in said case No. 1996 was and is void, the court having lost jurisdiction of said case, by reason of the fact that the appellant herein against whose property the judgment in said Case No. 1996 was rendered, had before the trial of said case, filed its motion for a change of venue in conformity with the laws of the Territory of Ar'zona, on account of the bias and prejudice of the trial judge, but which was unlawfully denied by the trial judge.

6. The said Supreme Court erred in affirming the judgment of the trial court, rendered in favor of the appellee

and quieting title to the property in dispute in appellee, for the reason that appellee claims title to said property herein, by virtue of a sale made under the judgment in Case No. 1996, wherein said judgment was and is void, in this that the judgment under which said sale was made was rendered and docketed in the trial court, after an appeal had been taken and perfected in said case to the Supreme Court of the Territory of Arizona, from a judgment theretofore rendered therein, and by reason of said appeal the trial court had lost jurisdiction of said case, to thereafter render any judgment therein.

7. That said Supreme Court erred in affirming the judgment of the said District Court, for that the facts show that the said judgment in said Suit No. 1996, under and through which said appellee claims title, was and is absolutely void, in that the said Suit No. 1996, was an action *in rem* and the said District Court had not taken or acquired jurisdiction over the *res,* that was the subject matter of said Suit No. 1996, and that the plaintiffs and defendants in said Suit No. 1996, were in collusion, except appellant herein, defendant therein; and that appellant herein, as defendant in said Suit No. 1996, filed an affidavit of "bias and prejudice" of the trial judge, and moved for a "change of venue" as provided for by the laws of Arizona; and that the judgment of said District Court in said Suit No. 1996, under and through which appellee claims title, was rendered therein, after appellant herein, as defendant therein, had perfected an appeal from said District Court, from a prior judgment therein, as provided for appeals by the laws of Arizona.

8. The said Supreme Court erred in affirming any decree against appellant for that all the defendants except the Gila Water Company, have answered disclaiming any right, title or interest in or to said property, and the record of

said Suit No. 1996, on its face shows that the judgment, under which defendant, the Gila Water Company claims title was and is absolutely void. The complaint in said suit prays for the sale of the property therein described, the judgment directs the sale of said property, and no judgment *in personam* was prayed for or decreed.

The complaint states, that said property is now in the hands of a receiver appointed by said Court in another action. The record shows that James McMillan, receiver, in Suit No. 1728 was said receiver. The judgment orders said James McMillan, receiver, *heretofore appointed,* and *now in possession of said property* to sell the same.

The record of said Suit No. 1996, shows that said James McMillan, receiver, aforesaid, was not made a party to said action No. 1996, nor were said Nos. 1996 and 1728 shown by said record to have ever been consolidated.

Nor was the *res,* the subject matter of the suit ever otherwise taken into the jurisdiction of the Court in said Suit No. 1996.

9. The said Supreme Court erred in affirming any decree against this appellant, for that all the defendants disclaimed all right, title and interest, except the Gila Water Company, and appellant in its answer, to said defendant, the Gila Water Company's cross-complaint, set up, that the judgment under which said defendant Gila Water Company would claim title, was absolutely void, and appellant was not allowed to introduce evidence to prove that said judgment was void.

10. The said Supreme Court erred in affirming the said judgment of the said District Court, for that the said Supreme Court found in affirming said judgment, that "in the year 1893 appellant brought suit against the Peoria Canal Company and the Arizona Construction Company, and applied for a receiver therein," and the said Court further

found therein that "all parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in Cause No. 1728, as though it had been placed in his possession, as a receiver appointed in Cause No. 1996, and further that orders were made by the Court concerning said receivership, which were entitled to both suits jointly." "Whereas said findings are wholly unwarranted, and are directly contradicted by the plain facts in the case, and as stated in the "Findings of Fact" in the nature of a "special verdict" herein, and appellant's motion for a rehearing was denied.

11. The said Supreme Court erred in affirming the said judgment of the said District Court and in finding therein that the failure "to enter a formal order extending the receivership from Cause No. 1728 to Cause No. 1996, was not one which rendered the judgment complained of void upon its face, but was a mere irregularity of practice," for that the facts show that said Suit No. 1996 was an action *in rem* for the sale of the certain property therein described, and that the judgment was for the sale of said property, and that no judgment *in personam* was prayed for or given in said action. The facts further show that no order was made or given, by which the Court could or did acquire jurisdiction of the *res* in said Suit No. 1996, prior to the hearing and determining of said action.

12. That said Supreme Court erred in affirming said judgment of said District Court, for that said Supreme Court found that the action in said Suit No. 1996, "having been reviewed by this Court and the Supreme Court, can not now be reviewed in this suit, and the Judgment in Cause No. 1996, was conclusive and not subject to collateral attack by appellant." Whereas the evidence introduced and offered shows that said judgment and all the proceedings and orders under it, were and are absolutely void and therefore the proper subject of attack in a collateral proceeding.

13. The said Supreme Court erred in not reversing the judgment of said District Court and in not giving judgment in favor of appellant, as prayed for in the complaint herein, for that the evidence shows that appellant was and is the equitable owner of the property described in the complaint herein, and that the legal title was and still is, either in the Peoria Canal Company, as trustee, or that in taking possession thereof in said Suit No. 1728, the legal title as well as the actual control and possession of said property, were and still remain, in the said District Court, for that, no deed has been shown from said Peoria Canal Company, nor has any order ever been made in said Suit No. 1728, by which the said District Court in said suit ever dispossessed itself of said title, control and possession. Said Peoria Canal Company and said James McMillan, receiver, have each of them answered disclaiming all right, title or interest in or to the property, and therefore judgment should have been given appellant, as prayed for in the complaint herein.

ARGUMENT.

The proceedings and decrees in Suit No. 1996 and sales thereunder were, in the courts below, and are here assailed as void upon the grounds:

1st. That the court never acquired jurisdiction, because

a. Suit No. 1996 was a proceeding *in rem.*

b. The property sought to be reached was already in the custody of the Court in Suit No. 1728.

c. That the two suits were never consolidated.

d. That no order was made in either purporting to extend the receivership from No. 1728 to 1996.

e. That the Court in Suit No. 1996 never acquired custody or control of the *res.*

f. That the Court in 1996 had no power to order sale of the property by the receiver in No. 1728.

g. That the sale was never authorized or confirmed in Suit No. 1728.

2d. That the proceedings in No. 1996 were collusive and fraudulent because it appeared

a. That the plaintiffs were all stockholders of the Arizona Construction Company and Peoria Canal Company.

b. That the defendants other than the appellant were all stockholders or creditors of those companies.

c. That the summons therein was returned the day after the suit was filed *non est* as to all of the defendants other than the appellant, and that all of the defendants except Burnett voluntarily appeared and answered within a few days, and the attorneys for the plaintiff appeared for Burnett and demurred to their own bill.

d. That the answers of all of the defendants, except Burnett, had been prepared before the filing of the bill.

e. And that the suit was a fradulent scheme upon the part of all parties thereto, other than the appellant, to procure a sale of the property and prevent the appellant having the relief it was seeking in No. 1728, viz.: To have its obligations to the Arizona Construction Company liquidated and converted into notes maturing in two years, and thus enable it in the meantime to issue and float its bonds.

f. And that said scheme was concocted when it was discovered by the stockholders of the Arizona Construction Company, that, notwithstanding the tripartite agreement, the appellant had the power thus to raise money by bond issue and had sought an injunction restraining the Peoria Canal Company from issuing non-redeemable bonds.

3d. Because the jurisdiction of the Court had been terminated by the filing of an affidavit of bias and prejudice and motion for change of venue.

4th. Because the jurisdiction of the Court had been terminated *pro tempore* by the appellant's perfected appeal from the decree of July 21, 1894, before the entry of the decree of November 20, 1894, under which the sale purported to be made.

As recognized by the court below, the power of the Court in No. 1996 to decree the sale of property in the custody of the receiver in No. 1728 and the validity of the sale under the appellee claims, are the controlling questions and the argument will be directed mainly to them.

> "Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision is correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. *But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but void.*"
>
> Elliott vs. Peirsol, 1 Pet. 328,340.
>
> *Re* Sawyer, 124 U. S. 200, 220.

It is elementary that, if the trial court lack jurisdiction, affirmation by the appellate courts can not give validity to its judgment, for jurisdiction in the Appellate Court depends upon jurisdiction in the lower court.

This principle necessarily applies even to this Court as the ultimate tribunal. If it act in a case without jurisdiction its judgment is void and it has the power to so declare.

In *ex parte* Crenshaw, 15 Pet. 123, the court had taken cognizance of an appeal from a circuit court and reversed the judgment. After the term expired a motion was made to vacate the judgment upon the ground that citation had never issued. It was objected that the Court had lost control over its judgment by reason of the expiration of the term; but it was held that the judgment of reversal was absolutely void for want of jurisdiction.

And in Voorhees vs. Jackson, 10 Peters, 449, Mr. Justice Baldwin delivering the opinion said (p. 474):

> "The only difference in this respect between this and any other court is that no court can revise our proceedings, but that difference disappears, after the time pre-

scribed for a writ of error or appeal to revise those of an inferior court of the United States or of any State; they stand on the same footing in law. The errors of the court do not impair their validity; binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. *If not warranted by the Constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority.

"The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."

In Des Moines Nav. Co. vs. Iowa Homestead Co., 123 U. S., 552, 556, this court again recognized the principle and considered the question whether the point raised rendered the judgments in the case absolutely void. Mr. Chief Justice Waite said:

"We proceed, then, to consider the only objection which has been made to this defense, and that is, the alleged want of jurisdiction in the courts of the United States—both this Court and the Circuit Court—to entertain and finally dispose of the suit in which the prior adjudication was had.

"The precise question we have now to determine is whether the adjudication by this Court, under such circumstances, of the matters then and now at issue between the Homestead Company and the Navigation and Railroad Company was absolutely void for want of

jurisdiction. The point is not whether it was error in the Circuit Court to take jurisdiction of the suit, or of so much of it as related to the Navigation and Railroad Company, originally, but as to the binding effect of the decree of this Court so long as it remains in force, and is not judicially annulled, vacated or set aside.

"But here the question is whether, if all the parties were actually before the Circuit Court the decree of this Court on appeal is absolutely void if it appears on the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state with the plaintiff."

In Mansfield, Coldwater & Lake Michigan Ry. Co. vs. Swan, 111, U. S. 379, 382, it was said:

"But the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this Court, of its own motion to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this Court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The attention of the Court is now called to the lack of jurisdiction of the trial court in Suit No. 1996 and the consequent lack of jurisdiction in this Court, and is asked, as in *ex parte* Crenshaw, *supra*, to declare that a vital jurisdictional point was not considered, and that its judgment in that case and the judgments of the territorial courts therein were and are consequently void.

Suit No. 1996 was a proceeding in rem.

The complainants therein, residents of Illinois, were simple contract creditors of the Arizona Construction Company and claimed to have advanced money which was expended by that company in constructing the appellant's dam and canal in Arizona, and sought to have the property sold to pay their claims.

As no opinion was filed in Suit No. 1996 by the trial court, the Territorial Supreme Court, or this Court, the theory upon which the complaint was sustained does not appear, but in any event there was and could be no personal liability of the appellant to the complainants or other creditors of the Arizona Construction Company—in the absence of the tripartite agreement there was none, and by that agreement it assumed no personal liability of any kind—and no recovery *in personam* was sought in the suit and none was or could have been decreed.

In Pennoyer vs. Neff, 95 U. S., 714, Mr. Justice Field said:

It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they effect property in the State, they are substantially proceedings in rem in the broader sense which we have mentioned.

In Heidritter vs. Elizabeth Oil Cloth Company, 112 U. S. 294, Mr. Justice Matthews said, referring to a suit to enforce a mechanic's lien:

> "Indeed so far as the proceedings in question sought to bind the land by enforcing the plaintiff's claim as a specific lien thereon, and to dispose of the premises in

satisfaction thereof by a sale, *they were substantially in rem, whether there was personal or merely constructive service of process upon the defendant owner.* The kind of process and mode of service could be material only with reference to the nature of the judgment. He could be bound personally only by his coming or being brought personally within the jurisdiction of the Court. But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title."

The circumstance that in Suit No. 1996 personal service was had upon the appellee and the remaining defendants voluntarily appeared could not affect the character of the proceedings, for

The proceedings in Suit No. 1996 being in rem, it was essential to jurisdiction in the District Court that the property be drawn into the hands of the Court in that suit by actual seizure or some action equivalent thereto.

In the Heidritter case Mr. Justice Matthews, continues:

"In such cases the land itself must be drawn within the jurisdiction of the Court, by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.

In Cooper vs. Reynolds, 10 Wall., 308, Mr. Justice Miller gives the following admirable exposition of jurisdiction:

"It is necessary, therefore, in the present case to inquire, whether the errors alleged affect the jurisdiction of the Court.

"It is as easy to give a general and comprehensive definition of the word "jurisdiction" as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the Court over the parties, over the subject matter, over the *res* or property in contest, and to the authority of the Court to render the judgment or decree which it assumes to make.

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the soverign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it. The power to render the decree or judgment which the Court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause."

See also Rose v. Himely 4 Cranch 268, 269.

Process upon the owner and parties interested does not create jurisdiction in such case, but is merely a step required by the constitutional guaranty of due process of law by way of giving opportunity to be heard.

In Windsor vs. McVeigh, 93 U. S., 279, Mr. Justice Field says:

"The seizure in a suit *in rem* only brings the property seized within the custody of the Court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be

> heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the Court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of notification is immaterial, but the notification itself is indispensable.

See also Andrews v. Andrews 188 US 14

The suggestion in the Heidritter case that the mere filing of suit might be the equivalent of seizure can apply only where the property is in possession of the owner and there is no obstacle to the attaching of jurisdiction. Here—

The property being already in possession of the receiver in Suit No. 1728, it was a legal impossibility for the Court to acquire jurisdiction over it in an independent suit, to which the receiver was not made a party.

As said by the Chief Justice *in re* Tyler, 149, U. S. 164, 181:

> "No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the Court, for the benefit of the parties to the suit and all concerned, and can not be disturbed without the leave of the Court."

and by Mr. Justice Harlan in Thompson vs. Phœnix Ins. Co., 136 U. S. 287, 297:

"The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor in a legal sense is the property in his possession. It is in the possession of the Court, by him as its officer."

See also Hicks v Jenks 185 US ~~125~~ 155
Davis vs. Gray, 16 Wall. 203, 217-218.
Cohen vs. Solomon, 66 Fed., 411, 413.
Am. L. & T. Co. vs. Central Vt. R. Co., 86 Fed. 392.

This rule applies to suits in the same court.

In Guaranty Tr. Co. vs. Green Cove R. R. 139 U. S. 137, 146, Mr. Justice Brown said:

"For although the Court was in possession of the property proceeded against in the bill filed by Budington, Wilson & Co., to which the Trust and Safe Deposit Company was defendant, such receiver had been appointed upon the bill filed by Canova, to which the plaintiff was not made a party; and the order consolidating that cause with the suit by Budington, Wilson & Co., in which the plaintiff was named as a party, and in which it was attempted to obtain service by publication, was not made until February 6, 1885, two months after the expiration of the time within which the notice of publication required the plaintiff to answer, and after a decree *pro confesso* had been taken against it. The receivership could not have the effect of subjecting the property to the control of the Court in the particular bill filed by Budington, Wilson & Co., against the plaintiff, until the order of consolidation which, as before stated, was after the time limited for plaintiff's appearance, and after an order *pro confesso* had been entered against it."

In American Loan & Trust Co. vs. Central Vermont R. Co., 86 Fed., 390-392, it was said:

"The substance of the whole is that those who claim the disposition or possession of property in the hands of receivers of a court must come to that court, in that case, to reach it, and an independent suit for that purpose can not be maintained even in the same court. Leave of court to file a bill separately must be had in the original cause, and this annexes a new bill to that cause, and amounts to the same as filing it in that case would."

It being disclosed in the bill in No. 1996 that the property was in the hands of the receiver in No. 1728, such receiver was the only necessary party defendant and the bill should have been dismissed for want of proper parties.

In Express Co. vs. Railroad Co., 99 U. S. 191, 198, it was said:

"The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was by the consent of the Court. Without this latter fact the bill could not have been filed or maintained. The suit would have been a contempt of the Court which had appointed the receiver, and punishable as such.

"No party defendant was necessary but the receiver. He was in the possession of the property and effects of the Railroad Company, subject to the order of the Court and could have specifically performed the contract, or paid back the money loaned if the Court had so directed. The presence of the other parties was immaterial, and the bill might well have been dismissed as to them."

Here the two suits progressed independently, no order of consolidation was ever entered (Findings, R. 45), and in contemplation of law the property continued in the custody of the Court in No. 1728 and subject only to its orders therein.

The suggestion in the opinion of the court below

> "That the record disclosed that the Court and all the parties including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver appointed in Cause No. 1728 as though it had been placed in his possession as a receiver appointed in Clause No. 1996" (R. 39),

is not supported by anything in the record, but, on the contrary, is in flat contradiction of the record facts found by the Territorial Supreme Court, viz.:

That no order was made consolidating the cases.

That the receiver in 1728 made the sale.

That no order was in terms made extending the receivership in No. 1728 to No. 1996.

That the receiver (in No. 1728) made the sale in No. 1996 and by the judgment rendered therein assumed to convey the title.

That the only orders made in No. 1996 relating to the receivership were those of

> May 29, 1894 (attempting to enlarge the powers of the receiver in No. 1728 so that "James McMillan as such receiver is hereby invested with full possession and such title as to assure the purchasers of such water rights a complete and perfect title to the same." Par. 12, R. 27-28).
>
> July 21, 1894 (decree directing McMillan "the receiver heretofore appointed by this Court and now in possession of said premises under the orders of this Court" to sell the property. Par. 6, R. 22).
>
> November 20, 1894 (the amended decree using the same language. Par. 7, R. 22).
>
> January 10, 1895 (after the appeal and not in the record which came to this Court. This confirmed the sale to Crowley reported by McMillan as having been made by him as receiver under orders and decree in No. 1996. Par. 9, R. 24).

> And November 23, 1898 (confirming sale to Greenhut for $18,800 reported by McMillan, as having been made that day under the amended decree of November 20, 1894, and the order of January 10, 1895, which had provided that possession be not given Crowley until he paid the outstanding receiver's certificates issued in No. 1728. This order of November 23, 1898, was entered after the affirmance by division of opinion in this Court).

The statement in the opinion below that orders were made concerning the receivership, entitled in both suits jointly (R. 39), is also controverted by the record. The only order jointly entitled was that of January 10, 1895, entered after No. 1728 had been submitted for decision (Jan. 5, 1894), and after final decree in No. 1996, and after the appeal which came here. Pennoyer v Neff supra

The Territorial Supreme Court in finding as a fact that no order was made consolidating Nos. 1728 and 1996 (R. 45) foreclosed any contention that this was an order consolidating the cases, but, in any event, jurisdiction to render the decree of November 20, 1894, if it existed, must be found in the record as it stood at that time.

The order of May 29, 1894, inasmuch as it attempts to direct a receiver in another and independent suit, was *coram non judice* equally with the attempted final decree.

The suggestion that, although no order was made consolidating the suits or extending the receivership to Suit No. 1996, the receivership was in fact extended to the second suit (Opinion R. 29) is a legal impossibility.

Suits can be consolidated only by a formal order.

In Merrill vs. Petty 83, U. S. 346, 347, it was said:

> "(1) That it was agreed between the parties that the two cases should be heard together, but the record contains no evidence of such an agreement, and if it did it could not avail the respondents, as it is settled

law that consent can not give jurisdiction. * * *

"(2) That the two cases were heard at the same time, before the District Court of the Eastern District, where this libel was pending. But that was a mere oral arrangement between the parties to expedite a decision, which neither did nor could have the effect to withdraw the other libel from the jurisdiction of the district court in which the suit was commenced. One was a proceeding *in rem* and the other was a suit *in personam,* and it does not appear that any attempt was made to consolidate them or to discontinue one and transfer it into the court where the other was pending. On the contrary, though they were both heard at the same time, it appears that separate decrees were entered, each in the respective district court where the suit was commenced. Separate appeals were also taken by the losing party in the district court where the decree was entered, and the two appeals were separately entered on the calendar of this Court.

"They were not heard together in the Circuit Court, as this suit was still before the commissioner, but the suggestion is that the merits in both suits were by consent discussed at the same time. Suppose that is so, still the fact remains that the respective decrees of affirmance were entered at different times and of course in the respective districts where the appeals from the respective district courts were pending. Nothing was done to consolidate the suits and separate appeals were allowed in this court."

No presumption will be allowed contrary to the facts stated in the record.

Settlemeier vs. Sullivan, 97 U. S. 449.
Galpin vs. Paige, 18 Wall. 366-7.
Thompson vs. Whitman, 18 Wall. 466.
Boswell vs. Otis, 9 How. 350.
Robinson vs. Fair, 128 U. S. 87.

Here Suit No. 1728 had been submitted on January 5, 1894 (Par. III, R. 25), and remained in such plight until

February 4, 1899, when it was again set for final disposition and decree was entered on February 18, 1899 (Par. V, R. 26).

No. 1996 proceeded independently to judgment July 21, 1894, and amended decree November 20, 1894 (Pars. 6, 7, R. 22), and the appeals therefrom pended until 1898, and sale to Greenhut was made in November, 1898.

The sine qua non of consolidation is that the two suits shall proceed as one.

The appeal in No. 1996 was from the decrees of July 21, 1894, and November 20, 1894, and presented the question of the right of simple contract creditors of the Arizona Construction Company to maintain such a suit against the property of the appellant, and, so confident were counsel of the lack of equity in the bill and of reversal by the appellate courts, that the fundamental question of jurisdiction, now urged, was overlooked.

Indeed, the attention of counsel was so centered upon that point and the question of change of venue that in the brief in this court it was even stated that the receiver had been appointed upon motion of the plaintiffs in suit No. 1996 (Bf. p. 54), and that the decree therein of Nov. 20, 1894, provided for the appointment of a receiver (Bf. p. 55). In Ward vs. Sherman 192 U. S. 168, 179, it was said that equity will not destroy rights on account of a mere technical mistake of counsel. Certainly inadvertence with respect to a vital jurisdictional matter should not be permitted to prejudice or estop.

After affirmance here by a divided court and the execution of the decree by a resale being attempted, attention was directed to the question of jurisdiction over the *res*, power in No. 1996 to sell property in the custody of the Court in No. 1728, and the anomaly of a receiver in one suit being, as such receiver, directed by a decree in a later and independent suit to make sale of the property in the custody of the Court in the first suit; and the appellant sought by

supplemental bill in Suit No. 1728 (which had been submitted January 5, 1894, and remained undecided) to present the question of lack of jurisdiction in Suit No. 1996 and obtain an injunction preventing the attempted sale, but was thrown out in the Territorial Supreme Court upon the technicality that its supplemental bill had not been served on the defendants nor leave of Court to file the same obtained (Par. V, R. 26, Par. X, R. 27), notwithstanding the record showed acknowledgement of service by the attorneys for defendants (Par. 21, R. 29) and that the Court had issued rules to show cause thereon.

In the meantime the sale and deed to Greenhut were made. As in the decree in No. 1996 (Pars. 6 and 7, R. 22), so in Suit No. 1728 the equitable title of the appellant under the tripartite agreement was recognized (Par VII, R. 26), but in No. 1728 it was found as fact that it had not been injured of damaged by any acts of the receiver in that suit or of the defendants (Par. IX) and the final judgment was that it take nothing for its action (Par. V, R. 26), the supplemental bill being ignored as not properly in the record; so that the result of that suit (No. 1728) was merely to deny specific performance of the tripartite agreement.

The appellee can not claim the benefit of a purchase at a sale made under color of judicial authority, but was put upon notice as to the authority of the receiver.

In a receiver's sale there must have been a suit in equity in which the receiver was duly appointed and such receiver must have been authorized in such suit to sell, and a sale so made must be confirmed by the court in the cause in which the receiver was appointed.

Koontz vs. Northern Bank, 83 U. S. 202.

In Shirver vs. Lynn, 2 How. 43, 60, the Court said:

> "The Chancellor is authorized to proceed in a summary mode, under the statute, for the sale of land, in the predicament of the above tract, after the decease of the devisee, without heirs. But he can only proceed on the application of persons interested. Here was no such application for the sale of this land. The sale being without authority, the ratification of it by the Court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest."

A receiver is not subject to orders passed in a case other than the one in which he was appointed

> Rinn vs. Astor Fire Ins. Co., 59 N. Y. 143-148.
> *In re* Mallery, 2 N. Y. Sup. 437, 438.
> Merritt vs. Sparling, 34 N. Y. Sup. 882, 885.
> Rogers vs. Corning, 44 Barb. 229, 231.

and confirmation of an unauthorized sale does not validate the sale.

> M. & M. R. R. Co. vs. Soutter, 2 Wall. 609.
> Bethel vs. Bethel, 6 Bush (Ky.), 65.

The decrees and sales in Suit No. 1996 being void for lack of jurisdiction, claim of title thereunder fails.

> Williamson vs. Berry, 8 How. 495, 542.
> Webster vs. Reid, 11 How. 437.

and other cases in this Court cited supra.

> Mulvey vs. Carpenter, 78 Ill. 580.
> Morris vs. Hogle, 37 Ill. 150.

Nor can the appellee rely on adverse possession. Section 2943, of R. S. of Arizona of 1901, provides:

> "Peaceable possession" within the meaning of this title is such as is continuous, and not interrupted by adverse suits to recover estate.

The appellant prosecuted Suit No. 1728 until denial of its motion for rehearing in the Territorial Supreme Court in April, 1902 (Par. 24, R. 29), after which it had two years to appeal to this Court. The present suit was commenced June 25, 1902.

Appellant having established an equitable title under the tripartite agreement and the trustee of the legal title, the Peoria Canal Company, having filed a disclaimer and the title of the appellee being shown to be void, the appellant was entitled to a decree quieting its title.

Section 4109, R. S., of Arizona, 1901, provides:

> "An action to determine and quiet title of real property may be brought by anyone having or claiming an interest therein, whether in or out of possession of the same against another who claims an estate or interest adverse to him."

This Statute is identical with Par. 3132, R. S. of Arizona of 1887, under which this Court has held that, in an action to quiet title, a party may plead a legal title and prove an equitable interest and be entitled to judgment.

> Ely vs. R. R. Co., 129 U. S., 292-3.
> See also Oliver vs. Dougherty, 68 Pac. 554.

The judgment of the Territorial Supreme Court should be reversed with direction to order a decree declaring and quieting the appellant's title.

Respectfully submitted,

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Of Counsel.